No. 85-521

In The
Supreme Court of the United States
October Term, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.,
Appellants,

v.

PUBLIC AGENCIES OPPOSED TO SOCIAL SECURITY ENTRAPMENT, ET AL.,
Appellees.

UNITED STATES OF AMERICA, ET AL.,
Appellants,

v.

STATE OF CALIFORNIA,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

Statutes, Codes and Other Authorities

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Appellee, pursuant to rule 16 of the Rules of the Supreme Court of the United States, hereby moves this Court to dismiss this appeal or to affirm the decision of the United States District Court for the Eastern District of California for the following reason:

This case does not present a substantial federal question.

INTRODUCTORY STATEMENT

Appellants appeal the decision of the United States District Court for the Eastern District of California, which ruled that Act of Congress, Pub.L. 98-21, section 103(a) and (b) is void and the State of California and its political subdivisions have the lawful right to withdraw from the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program") as long as they have met the requirements of the agreement between the United States and the State of California and the law. It should also be noted that in its Statement of Parties To The Proceedings, appellants have set forth an incomplete list of the parties.

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SUMMARY OF ARGUMENTS

We will demonstrate that there is no substance to the arguments raised by appellants in their Jurisdictional Statement ("J.S."). Those arguments are that agreements executed pursuant to 42 United States Code section 418 are not true contracts and, thus, are subject to congressional modifications at will; or, in the alternative, if they are true contracts, they are nevertheless subject to congressional modification for which courts can give only minimal scrutiny.

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STATEMENT REGARDING THE FACTS

Although the Social Security Act (42 U.S.C., §§ 301 et seq.) exempted state and local governments from mandatory participation in the program, in 1950 the Act was amended to permit the states to enroll their employees and those of their political subdivisions in the program upon the execution of an agreement with the United States Secretary of Health and Human Services.

Effective January 1, 1951, the State of California ("State") and the United States executed an agreement ("Agreement") pursuant to 42 United States Code section 418(a) (1) under which the Old Age, Survivors and Disability Insurance Benefits program of the Social Security Act ("Program") would be extended to public employees if and when the State and its eligible public agencies chose to include them.

As originally enacted and in effect on January 1, 1951, the Agreement permitted the State to withdraw any coverage group, that is, eligible employees of the appellee public agencies, upon two years' advance notice to the Secretary. (42 U.S.C., § 418(g).)

To implement its Agreement, the State enacted enabling legislation (Gov. Code, §§ 22000-03) pursuant to which Agreement and legislation, the State entered into individual agreements with those public agencies wishing to participate in the Program. Then the public agencies became enrolled in the Program when the State and the United States modified the state/federal agreement to include them. (42 U.S.C., § 418(c)(4).) The public agencies were required by the State's enabling legislation to make certain "contributions" to the State as payment for their

participation. (Gov. Code, §§22551-53.) As permitted by that legislation, the public agencies could withdraw from coverage (and concomitant liability to the State), upon two years' advance notice to the State. (Gov. Code, § 22310.)

Then, in April 1983, Congress enacted Public Law No. 98-21, section 103(a) and (b), amending 42 United States Code section 418(g), to provide that "[n]o agreement under this section may be terminated, either in its entirety or with respect to any coverage group, on or after April 20, 1983." In other words, this amendment prevented any state from withdrawing coverage for any set of its employees, even if a termination notice had been filed and was pending at the time Public Law No. 98-21, section 103(a) and (b) was enacted.

The State, which had a section 418 Agreement with the Secretary since 1951, had filed termination notices through April 1983, on behalf of approximately 70 of its political subdivisions with approximately 34,000 employees. However, Public Law No. 98-21 prevented the termination from taking place in due course.

The appellees then filed these suits to challenge the amended section 418(g), which prohibited the State from withdrawing from the Program.

The district court decided that the Agreements were contracts and thus properly within the meaning of the Fifth Amendment's Takings Clause. The district court also found that the right to withdraw was a contractual right and went on to conclude, therefore, that Congress could not deprive the State of that right without just compensation. However, the district court said it could not

order "just compensation" in the usual sense because of the unique circumstances. Instead, the court declared that amended section 418(g) is void and that the State and its political subdivisions have the lawful right to withdraw from the Program.

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ARGUMENT

I

INTRODUCTION

In its opinion, the district court held that apart from the statute, appellees have a contractual right to withdraw from the System. The court recognized that Congress may terminate the statutory right to withdraw but that it may not abrogate or repudiate the State's contractual rights.

Because this proposition is so clear, simple and undeniable, appellants have advanced an array of conclusions rather than legal authority to support their thesis that the Agreement is not a contract. (J.S. 10-16.) They also proffered additional conclusions that even if the Agreement is a contract, they are not bound by its terms because Congress amended section 418(g) for the public good. (J.S. 16-19.)

Moreover, because of their tenuous position, appellants have referred interchangeably to three different sets of relationships. Since each of these relationships has a different legal effect as demonstrated by the opinions of this Court, it is vital to recognize their discreteness and keep them in their proper context. These relationships are as follows:

1. Express contracts (agreements) to which the federal government is by the terms of the contract one of the parties to the contract. It is this type of relationship which is not only at issue in this case but also which this Court consistently has held binds the federal government. Accordingly, any decisions of this Court which do not deal with this type of relationship are simply inappropriate.

2. Legislative acts which may or may not confer contractual status upon parties depending upon the statutory language involved. The instant case is not such a case.

3. Contracts between a governmental entity other than the federal government and private parties, or strictly between private parties. Again, the instant case is not such a case.

Thus, the appellants' Jurisdictional Statement should be read with these distinctions clearly in focus.

II

THE DISTRICT COURT PROPERLY HELD THAT APPELLANTS HAVE A CONTRACTUAL RELATIONSHIP WITH APPELLEES.

As the district court noted, the Agreement executed between appellants and appellees evidences an agreement between the parties that each promises to do certain things and to assume certain obligations. "Under any definition of contract, this is a contract. See, *e.g., Woods v. United States*, 724 F.2d 1444, 1449 (9th Cir. 1984) (citing *Pennhurst State School & Hospital v. Holderman*, 451 U.S. 1, 17 (1981))." (*Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler*, 613 F.Supp. 558, 573 (D.C. Cal. 1985).)

Because of the elementary nature of this legal concept, appellants have relied on their conclusionary statement that "Section 418 [agreements] thus constitutes a social welfare program essentially universal in its application, rather than 'a contractual arrangement.' *National Railroad Corp. v. Atchison, T. & S.F. Ry.* . . . . " (J.S. 10-11.) Appellants continue with further reliance upon *National Railroad* for other generalized conclusions. Unfortunately for appellants, however, this Court pointed out that there is a definite distinction between contracts to which the United States is and is not a party.

> "Because, as we have demonstrated, neither the Act nor the Basic Agreements created a contract between railroads and the United States, our focus shifts from a case in which we confront an alleged impairment, by the government, of its own contractual obligations, to one in which we face an alleged legislative impairment of a private contractual right. We therefore have no need to consider whether an allegation of a governmental breach of its own contract warrants application of the more rigorous standard of review that the railroads urge us to apply. Instead, we turn to consider whether the payment obligation in §405(f) of the Act unconstitutionally impairs the private contractual rights of the railroads." *Woods v. United States*, 724 F.2d 1444, 1454-1455 (9th Cir. 1984).)

Appellants then argue not only that pursuant to 42 United States Code section 1304, Congress has repealed the termination right but also that contractual arrangements remain subject to subsequent legislation. As far as the former is concerned, there is no doubt that Congress can repeal or modify the statute. But as the district court noted:

> "Even if Congress' power to amend the statute is incorporated into the contract, such incorporation does not address the question of whether, when Congress exercises that power, it may deprive the State of its existing contractual rights without compensation. By virtue of the Fifth Amendment, Congress is simply not free to deprive the State of its contractual right without just compensation." *(Pub. Agencies Opp. To Soc. Sec. Entrapment v. Heckler, supra,* 613 F.Supp. at 574.)

The decisions upon which appellants rely hardly support their second contention. Aside from *National Railroad Passenger Corp. v. Atchison T. & S.F. Ry.*, — U.S. — , 105 S.Ct. 1441 (1985), appellants refer to *Merrion v. Jicarillo Apache Tribe,* 455 U.S. 130 (1982), which is totally inapposite. In *Merrion,* this Court held that the failure to mention severance taxes in the oil leases on tribal lands did not prohibit the Indians from imposing the tax because the Indians always had the sovereign power to tax. But the fact that the sovereign retained the power to tax irrespective of the contract has no bearing upon the rights and obligations that are set forth in the instant parties' Agreement.

Appellants then seize upon a statement from *Flemming v. Nestor,* 363 U.S. 603 (1960) in support of their position without first pointing out the salient fact that in *Flemming* this Court was determining the rights of an ordinary non-governmental employee covered by the Social Security Act. Interestingly enough, the Court also said that Congress may not modify the statutory scheme of the program "free of all constitutional restraint." (*Id.,* at 611.)

Next, appellants rely on certain language from *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1976) to fortify their sovereign power contentions. But it does not assist them for this Court made clear that,

> " . . . a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly a State is not free to impose a drastic impairment when an ardent and more moderate course would serve its purposes equally well." *(Id.,* at 30-31.)

So this Court said in adopting a two-prong test of reasonable and necessary, that is, necessary to achieve the plan and reasonable in light of the circumstances. *(Id.,* at 29.) Here, appellants presented no evidence whatsoever before the district court to show whether or not they met the test set out in *United States Trust.*

Finally, appellants egregiously misparaphrase language from *National Railroad* with their statement that "when a contract is impaired by federal legislation, 'the judicial scrutiny [is] quite minimal.' *(National Railroad Passenger Corp.,* slip op. 21.)" (J.S. 16.) The truth of the matter, however, is that this Court said: "*When the contract is a private one, and when the impairing statute is a federal one,* this next inquiry is especially limited, and the judicial scrutiny quite minimal." *(Id.,* 105 S.Ct. at 1455.)

Appellants add further confusion with their statement "to make out a constitutional violation, the complaining party must demonstrate ' "that the legislature has acted in an arbitrary and irrational way." ' (Various citations.)" (J.S. 16-17.) Appellants omitted to state that this principle applies to situations or contracts solely involving private parties. For example, see *Pension Benefit*

Guaranty Corp. v. Gray & Co., — U.S. — , 81 L.Ed.2d 601, 610-611 (1984).

Most importantly, this Court has observed on previous occasions that "impairments of a State's own contracts would face more stringent examination under the Contract Clause than would laws regulating contractual relationships between private parties . . . ." (*Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, fn. 15 (1977).)

Thus, in analyzing the issue in this matter, we must be continually mindful of the fact that here we are dealing with a contractual agreement between the United States and the appellees, a circumstance which is governed by tests which are different from those discussed at length by appellants in their Jurisdictional Statement.

III

THE DISTRICT COURT PROPERLY FOUND THAT THE APPELLANTS ARE BOUND BY THEIR CONTRACTUAL OBLIGATIONS.

The principle is well established that the United States and its duly appointed agents are bound by their contractual obligations. Years ago in *Perry v. United States*, 294 U.S. 330, 350-351 (1935), this Court said:

> "On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.

> "We do not so read the Constitution. . . . To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, *a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. . . .* " (Emphasis added.)

This Court in *Perry* further noted that in *Lynch v. United States*, 292 U.S. 571, 580 (1934), which centered around the severe economic conditions of the depression, this Court had earlier said:

> "No doubt there was in March, 1933, great need of economy . . . But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. *To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. . . .* " (Emphasis added.)

This principle was again recognized by this Court in *National Railroad Corp. v. Atchison, T. & S.F. Ry. Co., supra*, — U.S. — , 105 S.Ct. 1455, fn. 24:

> "There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements. . . . To say that the Congress may withdraw or ignore that pledge is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government. *Perry v. United States*, 294 U.S. 330, 350-351, 55 S.Ct. 432, 434-435, 79 L.Ed. 912 (1935)."

In spite of this long standing state of the law, appellants seek to circumvent their obstacle by claiming that 42 Uni-

ted States Code section 1304 gives Congress the right to change contracts as well as statutes. This Court described a similar contention as being absurd: "A promise to pay, with a reserved right to deny or change the effect of the promise, is an absurdity." *(Murray v. Charleston,* 96 U.S. 432, 445 (1877), cited with approval in *United States Trust Co. v. New Jersey, supra,* 431 U.S. at 25.)

Appellants' last defense is based on the "general welfare" or "for the good of the people" argument. This, too, is as untenable as their other contentions. As trying as the economic climate has been in recent years, it pales in comparison with the utter despair of the 1930's. Yet, this Court in *Perry v. United States, supra,* 294 U.S. 330, did not find those truly extreme economic conditions as justification for repudiating or even substantially altering the contractual obligations of the United States.

To argue, as do appellants, that the change of a key provision in a contract without which appellees would not have entered into the System's domain is not a repudiation is to argue that nothing in a contract really matters unless the United States so wants it. Of course, that is total nonsense. Where substantial prejudice occurs, as it does here with the elimination of the withdrawal provision, the unilateral change sought by the System obviously results in a repudiation of the contract. Nothing could be clearer in this regard than this Court's statement that, "To abrogate contracts, in the attempt to lessen government expenditures, would be not the practice of economy, but an act of *repudiation.*" *(Perry v. United States, supra,* 294 U.S. at 352-353; emphasis added.)

IV

THE DISTRICT COURT PROPERLY FOUND THAT CONTRACTS WITH THE UNITED STATES ARE VESTED PROPERTY RIGHTS AND THEIR TAKING WITHOUT DUE PROCESS OF LAW AND/OR JUST COMPENSATION VIOLATES THE FIFTH AMENDMENT.

The district court correctly found that there was a "taking" without just compensation in this case. As this Court said in *Lynch v. United States, supra,* 292 U.S. at 579.

> "The Fifth Amendment commands that property be not taken without making just compensation. *Valid contracts are property,* whether the obligor be private individual, a municipality, a State or the United States. *Rights against the United States arising out of contract with it are protected by the Fifth Amendment.*" (Emphasis added.)

The appellants, however, blandly conclude that the district court "misapplies the law of takings" (J.S. 9) without demonstrating how the court misapplied the law. Appellants have not cited a single decision to support their statement. Instead, they refer to cases which deal with retroactive application of a congressional act, contracts with private parties, or other totally disparate situations. None of appellants' cited cases involved an express contract to which the United States Government was a party, as is the case here. This fact alone makes the district court's conclusion that there had been a "taking" even more compelling than *Lynch* or *Perry,* and for that matter *United States Trust.*

V

THE DISTRICT COURT CORRECTLY FOUND THAT POSSE PLAINTIFFS WERE PROPERLY BEFORE THE COURT.

Appellants' attempt to challenge POSSE Plaintiffs' standing clearly is misplaced. 42 United States Code section 405(g), which appellants argue is the only mechanism by which POSSE plaintiffs could challenge the Act, manifestly has no application to this case.

In *Matthews v. Eldridge*, 424 U.S. 319, 330 (1976), this Court said:

> "But cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deferences to the agency's judgment is inappropriate. This is such a case.
>
> *"Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement. . . ."* (Emphasis added.)

In the case at bar, POSSE Plaintiffs made no "claim of entitlement" at all. They challenged the statute on grounds entirely unrelated to any questions of entitlement. There is no "claim." Thus, there is no need to exhaust any administrative remedies and 42 United States Code section 405(g) is inapplicable. In fact, more than being merely "collateral" as in *Eldridge*, POSSE's constitutional challenge stands independently and alone.

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CONCLUSION

For the reasons set forth above, we respectfully submit that this Court should dismiss the appeal or, in the alternative, affirm the decision of the district court.

Respectfully submitted,

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